Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term 1978

No. 77-1103

EDWARD LEE BRYAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE,
FENNER, & SMITH, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

L. BRUCE McDANIEL
Attorney for Petitioner
612 Branch Bank & Trust Building
Post Office Box 1182
Raleigh, North Carolina 27602
Telephone: 919/828-4486

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS TO REVIEW ITS DECISION

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES:

The Petitioner Plaintiff, Edward Lee Bryan (hereinafter referred to as the Petitioner), respectfully requests that a Writ of Certiorari issue to review the decision of the Fourth Circuit Court of Appeals, entered by that Court on November 9, 1977 (Case No. 76-2137), which opinion reversed a previous jury verdict in favor of the Petitioner Plaintiff, tried in the District Court for the Eastern District of North Carolina. The Petitioner seeks to have this Court review the said opinion, and in support thereof respectfully shows that:

1. This petition is filed pursuant to Rule 19 (b) of the Rules of the Supreme Court of the United States (U.S.C. Title 28), on the grounds that the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings in the appeal of this case, in the following two respects:

   I. DUE TO DEATHS AND ILLNESS, ONLY ONE FOURTH CIRCUIT JUDGE WHO HEARD THE ORAL ARGUMENTS OF THE APPEAL TO THE FOURTH CIRCUIT WAS ALIVE ON THE OPINION DATE OF NOVEMBER 9, 1977, AND THAT JUDGE WAS THE JUDGE WHO WROTE THE OPINION. THOUGH THIS MAY NOT BE ERRONEOUS AS A MATTER OF LAW, THE RESULT IS SO HIGHLY IRREGULAR AS TO NOT SATISFY THE REQUIREMENT THAT JUSTICE NOT ONLY BE DONE, BUT THAT IT APPEAR TO BE DONE.

   II. THE FOURTH CIRCUIT ALSO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY IN EFFECT SITTING AS A JURY FOR THE RE-TRIAL OF THIS CASE, RATHER THAN CONSIDERING THE EVIDENCE OF THE PETITIONER PLAINTIFF AND THAT OF THE RESPONDENT DEFENDANT, MERRILL LYNCH, PIERCE, FENNER, & SMITH, INC. (HEREINAFTER REFERRED TO AS THE RESPONDENT), IN THE LIGHT MOST FAVORABLE TO THE PETITIONER PLAINTIFF, WHEN THE ISSUE ON WHICH THE FOURTH CIRCUIT REVERSED THE DISTRICT COURT WAS THE FAILURE OF THE DISTRICT COURT TO GRANT A DIRECTED VERDICT FOR THE RESPONDENT DEFENDANT. THE PREPONDERANCE OF THE FACTS CITED IN THE OPINION OF THE FOURTH CIRCUIT ARE PRIMARILY FROM THE BRIEF OF THE RESPONDENT DEFENDANT, FAILING TO MENTION MANY PERTINENT FACTS OF THE PETITIONER PLAINTIFF, AS WELL AS CONSIDERABLE EVIDENCE OF THE RESPONDENT DEFENDANT FAVORABLE TO THE PETITIONER PLAINTIFF. IN SEVERAL RESPECTS, THE OPINION OF THE FOURTH CIRCUIT HAS NOTED AS FACTS

(JUST AS DID THE BRIEF OF THE RESPONDENT DEFENDANT), STATEMENTS UNSUPPORTED BY THE RECORD AND IN SOME CASES INCONSISTANT WITH THE RECORD.

2. A copy of the decision of the Fourth Circuit is attached as an Appendix hereto.

3. Questions Presented for Review. The two questions presented for review are as follows:

   I. Whether a decision by the only member of the Fourth Circuit who heard oral arguments and who wrote the decision of the Court, due to other deaths and sickness, is so irregular as to constitute a departure from the accepted and usual course of judicial proceedings.

   II. Whether the failure of the Fourth Circuit to consider evidence favorable to the non-movant in an appeal, the decision for which was based solely on the failure of the trial court to grant a directed verdict against that non-movant, was erroneous and a departure from the accepted and usual course of judicial proceedings.

4. This Petition involves an action filed by the Petitioner based upon causes of action against the Respondent, a broker-dealer, alleging damages as a result of the manner in which the Petitioner's margin account was handled by the Respondent. One count was based upon alleged violations of the federal securities acts; another a state action for fraudulent breach of contract; a third sounding in negligence in the management of the margin account; and a fourth for punitive damages. At the end of all of the evidence, the trial court dismissed the federal charges and submitted the case to the jury on the issue of negligence only. The record does not indicate whether the trial court concluded that the court had diversity jurisdiction or that the negligence claim could continue under the court's pendent jurisdiction. In any event, the diversity jurisdiction was obvious on the face of the complaint, and the trial court could have maintained jurisdiction over the negligence claim pursuant to its pendent jurisdiction. See Rosado v. Wyman, 397 U.S. 397 (1970); Hagans v. Lavine, 415 U.S. 528 (1954). The jury found that the Respondent Defendant was negligent; that the Petitioner Plaintiff was not guilty of contributory negligence; and awarded the Petitioner Plaintiff damages in the amount of $19,500. From that jury verdict, the Respondent Defendant appealed to the Fourth Circuit, which reversed the jury award in favor of the Petitioner Plaintiff, solely on the grounds of error on the part of the trial judge (also unfortunately deceased as of the appeal) in failing to direct a verdict for the Respondent Defendant, apparently based solely on the alleged lack of proximate cause.

5. Statement of Facts. The pertinent facts relative to this Petition are set out as follows. Since the Fourth Circuit considered primarily only the evidence of the Respondent Defendant favorable to itself, and disregarded the overwhelming evidence of the Petitioner Plaintiff as well as the evidence of the Respondent Defendant favorable to the Petitioner Plaintiff, these facts must be necessarily somewhat more extensive than is usually required, with notations made in the instances where the Fourth Circuit disregarded evidence favorable to the Petitioner Plaintiff, and in some instances took misstated facts directly from the brief of the Respondent Defendant, instead of considering the evidence in its light most favorable to the Petitioner Plaintiff as the law requires.

   (a) Prior to 1973, the Petitioner opened a margin account with the Respondent Defendant, the account being handled by one Charles Leforte, an employee of the Respondent Defendant and the Account Executive who serviced this margin account.

   (b) During March of 1973, the Petitioner had engaged in certain transactions in that margin account resulting in certain irregularities in connection with the bookkeeping involved in the account, and these irregularities were straightened out to the satisfaction of all concerned, with the assistance of the then Operations Manager of the Respondent. At the time this

account was corrected in March of 1973, the Respondent advised the Petitioner of the correct status of the account at that time, and confirmed in writing the very next day the complete status of the account. These facts were admitted by Leforte at the trial. The facts in this paragraph were not noted in any way whatsoever by the Fourth Circuit in its decision.

(c) In September, 1973, Leforte explained to the Petitioner the procedure whereby there may be effected a dollar for dollar substitution in connection with the margin account, whereby certain stocks in that account may be exchanged for an equal dollar value of certain other stocks. This was admitted by Leforte at the trial.

(d) On or shortly before October 12, 1973, the Petitioner inquired into the possibility of making a dollar for dollar substitution in his margin account with the Respondent, proposing to exchange 600 shares of American Mortgage Insurance Corporation (AMIC) stock for 400 shares of Crouse Hinds stock. The Petitioner was incorrectly informed by the Respondent that the status of his margin account was such that he could engage in this proposed dollar for dollar substitution, whereby he could substitute 400 shares of Crouse Hinds stock for 600 shares of AMIC stock which were already in his account and which apparently had approximately the same value, without incurring a Regulation T call. The proposed transaction was affected, but a Regulation T call was incurred however. When this error became known, the Respondent notified the Petitioner that it would rescind or bust the transaction. These facts were admitted by testimony of Leforte and by a Vice President and the Sales Manager of the Respondent. Leforte also admitted that the Respondent was recommending the Crouse Hinds stock at that time and that he very well could have recommended it to the Petitioner.

(e) In an effort to effectively rescind this transaction and correct the account of the Petitioner, he met

with various representatives of the Respondent on October 19 and 22, 1973. The Petitioner was advised by various representatives of the Respondent that the substitution transaction would be rescinded or busted.

(f) At the initial conference between the Petitioner and representatives of the Respondent on October 19, 1973, the Petitioner specifically asked for an exact written accounting of the status of his margin account, showing the shares of stock in the account, the correct credit balance, the correct debit balance, and at what value the stocks which he held could decline before he would be forced to sell. Again on October 22, 1973, the Petitioner specifically requested the representative of the Respondent to please get him a correct written statement showing the complete status of his account. The Respondent's salesman, Leforte, said it would have to come from New York. The Fourth Circuit cites as a fact that the Petitioner was given a complete oral status report on his account on October 22. This is contrary to the Petitioner's evidence and even contrary to a considerable portion of the Respondent's evidence.

(g) The announcement by the official of the Respondent indicated to the Petitioner that the transaction had been rescinded, which would mean that his account would have 0 shares of Crouse Hinds in the account. However, at about the end of October, 1973, the Petitioner received a confirmation from the Respondent showing that he had purchased 400 shares of Crouse Hinds stock. Finally, about the middle of November, 1973, the Petitioner received his October end statement (for the period ending October 26, 1973), showing that 600 shares of AMIC stock had been sold and 200 shares of Crouse Hinds stock purchased. Though these discrepancies were not denied by the Respondent at the trial, the decision of the Fourth Circuit indicated that there were no discrepancies in the account at all and that the Respondent should have no questions about the status of the account. This is not supported by the record.

(h) The Petitioner then contacted Leforte about these discrepancies and Leforte admitted that something was wrong. At that time, the Petitioner again asked for a correct report on the revised status of his margin account with the Respondent. Leforte said that the Respondent's back office was busy. This was admitted by the testimony of Leforte. Consistent with the brief of the Respondent, these pertinent facts are completely omitted in the factual references in the decision of the Fourth Circuit.

(i) From October 19, 1973 until early December, 1973, the Petitioner tried almost daily to determine the correct status of his margin account, but without success. The Respondent's salesman, Leforte, admitted these contacts by the Petitioner and also admitted that there was confusion in this account throughout the whole period of time from late October through November, 1973. Leforte further testified that the New York office of the Respondent had this information and could have furnished it to the Petitioner at any time during this period of time. Consistent with the brief of the Respondent, these highly pertinent facts are completely omitted from the factual citations in the decision of the Fourth Circuit.

(j) About November 8, 1973, the Petitioner received a margin call from the Respondent which he knew was somehow incorrect. At about this date, he went to see the Respondent's salesman, Leforte, and in the discussion between them at that time, it appeared that the status of the account was from 8,000 to 9,000 dollars off in some manner, which Leforte admitted. Leforte said that he would contact people in his accounting department about this discrepancy. Leforte's testimony confirms these facts. Again similar to the brief of the Respondent, the facts cited by the Fourth Circuit completely omit these admitted facts shown in the record.

(k) During this entire period of time from late October until early December, 1973, the Petitioner continued

to try to learn from the Respondent the correct status of his account, especially since he was vulnerable because the market was declining. Representatives of the Respondent kept saying that this information would have to come from New York, or that the back office was too busy to furnish this information. Again consistent with the brief of the Respondent at the Fourth Circuit level, the facts cited in the decision of the Fourth Circuit completely omit the foregoing undenied facts.

(l) During this period of time, the Petitioner was especially concerned since he had never received or even seen any reversal slips reflecting the reversal of the exchange transaction effected on October 12, 1973. Again, these facts were not mentioned in the facts noted by the Fourth Circuit.

(m) The October end statement, received about mid-November, 1973, was incorrect, as admitted by representatives of the Respondent. Moreover, the November end statement was not received until after the Petitioner's account was liquidated on December 3, 1973. Mr. Patrick Fitzgerald, Operations Manager of the Respondent admitted that the October end statement, received in mid-November, 1973, was wrong. The Respondent offered no evidence refuting the Petitioner's evidence that he never received a correct written confirmation of the correct status of his account until after the margin account was sold out on December 3, 1973. This fact was also admitted by the Respondent's salesman, Leforte.

(n) Based upon the different paper writings furnished the Petitioner by the Respondent, referred to hereinbefore, and the also totally different oral representations made by the representatives of the Respondent to the Petitioner, he, trying to make his own calculations, came up with at least three versions of what the debit balance of his margin account with the Respondent may have been, all substantially different. These differences were dis-

cussed with the Respondent's salesman, Leforte, who acknowledged these discrepancies and said that he would try to straighten them out. It was never straightened out, to the knowledge of the Petitioner, until after his margin account was liquidated on December 3, 1973. Again, these facts were completely omitted in the decision of the Fourth Circuit.

(o) The Petitioner's consternation in not receiving the corrected status of his margin account with the Respondent was further complicated by the confusing and contradictory margin and Regulation T calls received from early October until early December, 1973. These calls, numbering approximately 18, represented approximately $25,000.00 in calls. The Petitioner was told by representatives of the Respondent to pay some of them and to ignore most of them. The Petitioner paid approximately $9,994.49 of these calls during this period of time. The Respondent's salesman, Leforte, admitted these facts in his testimony. Leforte also admitted the confusion in these margin calls during this period of time. Again, these facts were completely omitted in the decision of the Fourth Circuit, consistent with the brief of the Respondent at the Fourth Circuit level.

(p) The Petitioner never received a correct status report of his margin account with the Respondent until after this margin account was liquidated on December 3, 1973.

(q) The Petitioner needed to know the status of his account in order to protect himself in this declining market during this entire period of time. The Respondent's salesman, Leforte, admitted this in his testimony at the trial.

(r) The Petitioner needed to know the correct status of this margin account, including the correct debit balance, and in order to know the correct debit balance, one needs to know the number of shares in the account, when and what shares were put in or took out and at what price, and which margin calls, if

any, were valid. In short, the Petitioner had no correct data base from which he could even have done his own calculations to determine the correct status of his account. The Respondent's Operations Manager, Fitzgerald, admitted that to get the correct debit balance, one would need to know the correct number of shares in the account, the previous correct debit balance, the respective dates involved, the commissions charged, and the interest charged in the account. Again, consistent with the Respondent's brief at the Fourth Circuit level, the decision of the Fourth Circuit completely omitted all of these pertinent facts. Based upon the rationality used by the Fourth Circuit in its decision, it would appear that the Fourth Circuit failed to understand the import of the facts in any event.

(s) The Respondent's Operations Manager, Fitzgerald, also admitted that the New York office of the Respondent had the correct status of the account by October 30, 1973. It was then sent to the branch office in Raleigh, which could have given it to the Petitioner. Again, these facts were omitted by the Fourth Circuit.

(t) The Respondent's Operations Manager, Fitzgerald, also admitted that the Petitioner had asked for a written status of the account on October 19, 1973, but that they did not give it to him -- even though they had it at the Raleigh office of the Respondent at that time. The Respondent's salesman, Leforte, also admitted that the Respondent had the information which the Petitioner was requesting at the time he was requesting it during this entire period of time. These facts were omitted in the facts cited by the Fourth Circuit.

(u) Because of the timing factors involved, at the time of the alleged rescission of the reversed transaction in the margin account of the Petitioner, there was an artificial credit in this account which, in a declining market, failed to trigger the normal sequence of margin calls which would have alerted everyone to

the Petitioner's danger. This fact was admitted by the Respondent's Operations Manager, Fitzgerald, and its salesman handling the Petitioner's account, Leforte. These highly pertinent facts which would appear to be certainly inconsistent with the simplification of the Fourth Circuit, were of course omitted in the decision by the Fourth Circuit.

(v) The stocks in the Petitioner's margin account with the Respondent continued to decline in value, and when the Petitioner was unable to meet the resulting maintenance calls, his account was liquidated by the Respondent on December 3, 1973.

(w) After the sellout on December 3, 1973, the Petitioner had a conversation with the Respondent's salesman, Leforte, on or about December 4 or 5, during which Leforte said that the special Two Dollar maintenance requirement for the Tally stock in the Petitioner's margin account precipitated the sellout. Leforte admitted that he did not know about that requirement at any time until after the sellout on December 3, 1973. Leforte also said that the Respondent's backroom should have told him about that special maintenance requirement for the Tally stock. Leforte admitted these facts in his testimony at the trial. The Petitioner's unrefuted testimony was that he would not have purchased the Tally stock had he known of this special Two Dollar Rule. The testimony of Leforte confirmed that Bryan told him this on December 4 or 5, 1973. The Fourth Circuit did some strange mathematical computations with regard to this Two Dollar Rule in its opinion, but those computations totally fail to take into account the fact that there was an artificial credit in the account which, in a declining market, failed to trigger the normal sequence of margin calls which would have alerted everyone to the Respondent's danger.

(x) The Petitioner's overall losses during this entire period of time, both upon meeting margin calls and by virtue of the final sellout, was approximately $63,210.00 as admitted by the Respondent. Of this

amount, the Petitioner claimed damages attributable to the willfulness and gross negligence of the Respondent in the amount of $32,246.77. This figure was determined by using a settlement date of October 19, 1973 (seven days after the trade date of October 12, 1973, since seven days is the usual settlement date insofar as broker-dealers are concerned), figuring the value of the stocks in his margin account as of that date, subtracting the debit balance as of that date, resulting in a net recovery of $23,027.38. That figure, added to the $9,219.39 which he paid in margin calls in November, 1973, resulted in a total net loss of $32,246.77 directly attributable to the Respondent. The total debits on the Tally stock aggregated $17,925.00, reduced by the credits which he received in the amount of $7,375.00 resulted in a net loss on the Tally stock of $10,550.00. This total loss figure of $32,246.77 was only about on-half of the Petitioner's actual losses in this margin account during this period of time in question.

(y) The statements on Page 15 of the opinion of the Fourth Circuit that the Petitioner never considered selling his stock and simply did not want to sell the stock are untrue and not supported by the record in any way. It was simply the jury argument by the attorney for the Respondent which the Fourth Circuit accepted. The unrefuted evidence is that the Petitioner continued to ask Leforte if he should sell some of the stocks in this account because of the declining market. Moreover, during this period of time in November, 1973, the Petitioner did in fact sell stock from this account. Leforte admitted at the trial that the Respondent sold some stock in November, 1973.

(z) As a footnote of interest, though it is completely irrelevant, the Fourth Circuit noted that in reversing the original exchange transaction on October 19, 1973, the Respondent had to absorb a loss of approximately $1,645.00. For purposes of setting the record straight, the evidence of record also shows that the

Respondent made profits of approximately $6,000.00 in commissions and interest on this margin account during this time in question, but this fact was of course not noted in the same or a comparable footnote in the opinion of the Fourth Circuit.

6. The Petitioner has served a copy of this Petition upon the Respondent, as shown by the Certificate of Service at the end hereof.

7. This Petition for Writ of Certiorari is filed with the Clerk of the Supreme Court of the United States within 90 days from the date of the entry of the decision of the Fourth Circuit on November 9, 1977, as required by law.

8. This Petitioner has not been negligent, nor has he delayed in filing this Petition; and he has done so as promptly as time and circumstances have permitted.

9. The decision in this case rendered by the Fourth Circuit will affect substantial rights to which the Petitioner is entitled unless the ruling of the Fourth Circuit is reversed by the Supreme Court because of the matters and things set out or referred to herein.

10. Between the trial and the decision by the Fourth Circuit, the Honorable J. Braxton Craven, Jr., the trial judge presiding by designation, died. At the time of the oral argument in the Fourth Circuit on April 8, 1977, Judge Haynsworth was absent because of the death of a member of his family. Between the time of the oral argument on April 8, 1977 and the decision dated November 9, 1977, the Honorable Tom C. Clark, who sat on the Fourth Circuit panel by designation, also died. The only judge who heard the oral argument who survived down to the decision date of November 9, 1977, was Judge Russell, who wrote the opinion.

11 Reasons for Granting the Writ. The two grounds upon which this Writ is requested are discussed hereinafter severally.

I. A decision with only the writer of the opinion being the sole surviving appellate judge who actually heard the oral argument, was such an irregularity as to constitute a departure from the accepted and usual course of judicial proceedings. This may very well not be a legal error in the technical sense, but it is so highly irregular that it should warrant a reversal by the Supreme Court of the Fourth Circuit opinion, reinstating the jury verdict from the District Court. While it is true that justice may be done in this irregular manner, it is important in the administration of justice that justice not only be done, but that it appear to be done. Due to the unfortunate deaths involved in this case, it would certainly not appear on the face of the record that justice was necessarily done. Therefore, in order to not only effect justice but appear to effect justice, all standards of fairness should require that this irregular decision by the Fourth Circuit be reversed and the jury verdict reinstated.

II. The failure of the Fourth Circuit to adhere to the proper legal standard in considering the sufficiency of the evidence in an appeal reversing a ruling on a motion for a directed verdict, was a clear departure from the accepted and usual course of judicial proceedings. The Fourth Circuit did not sit as an appellant court testing the sufficiency of the evidence against the proper legal standard; they picked and gleaned among a small minority of facts offered by the Respondent to accumulate the facts in the opinion to justify the decision of reversal. This was improper, erroneous, an abuse of the appellant process, and certainly a departure from the accepted and usual course of judicial proceedings.

Consistent with the brief of the Respondent, the Fourth Circuit not only ignored the overwhelming amount of the Petitioner's evidence in considering the Respondent's motion to dismiss, but even ignored a substantial amount of evidence offered by the Respondent itself. This approach is improper, contrary to law, and inconsistent with the ordinary course of judicial proceedings. For purposes of a directed

verdict, the evidence of the non-movant should be considered in its favorable light, giving the non-movant, the Petitioner in this case, the benefit of every reasonable inference. Chicago & N.W. RY Co. v. Froehling, 179 Fed. 2d 133 (7th Cir. 1950); Minton v. Southern RY Co., 368 Fed. 2d 719 (6th Cir. 1966). In other words, the attorney for the Respondent made no more than another jury argument to the Fourth Circuit, and the Fourth Circuit improperly selected isolated facts on which to base their opinion, and improperly gave a new jury verdict to the Respondent. This is not only improper, but an abuse of the judicial process.

Reference is made to the statement of facts contained hereinbefore, and the Petitioner would respectfully request that the Supreme Court compare these overwhelming facts with the so-called facts in the opinion of the Fourth Circuit. It scarcely seems that we are talking about the same case. To add insult to injury, there are several instances where facts are cited as facts in the opinion of the Fourth Circuit, apparently taken from the same improper presentation of facts in the brief of the Respondent at the Fourth Circuit level, where the facts are not supported by the record, and in some instances, directly refuted by the record, often by evidence from the Respondent itself.

The decision of the Fourth Circuit is apparently based upon what it finds to be a failure of the requisite showing of proximate cause at the trial level. Secondarily, the Fourth Circuit apparently had problems with a jury verdict which had to be computed from various documents admitted into evidence by the Respondent itself, since a pencil and paper would have had to be involved.

The essential facts which underscore this prerequisite proximate cause and the resulting damages to the Petitioner are that the Respondent initially brought to the attention of the Petitioner the procedure whereby there could be effected a dollar for dollar substitution in connection with the Petitioner's margin account; the Respondent approved the proposed dollar for dollar substitution which was effected on October 12, 1973; admittedly, this approval was in error; the Petitioner's account thereafter became confused, with him receiving various contradictory writings and oral representations from the Respondent, all of which resulted in a different status report insofar as this margin account was concerned; the Petitioner repeatedly sought to

learn the correct status of this margin account from the Respondent; by the admissions of the various agents of the Respondent, they had that information which he was requesting in the Raleigh branch office throughout this whole period of time and did not make it available to the Petitioner; the confusing nature of the account of the Petitioner was further complicated by confusing and contradictory margin and Regulation T calls against this account, some of which he was told to pay and some of which he was told to simply ignore, indicating that the account was thoroughly confused; there was no way in which the Petitioner could have computed the status of this account, since he did not know what stocks were in the account, what stocks had been put in or taken out and on what date or at what price, the charges against the account for margin calls or Regulation T calls, the commissions and interest charged against the account, or any other information needed to compute the correct debit balance of the account at any time during this period in question; the Respondent knew that the Petitioner needed this information, knew that he was requesting it, they had it, and they refused to furnish it to the Petitioner, knowing that he was in a position of peril with a declining market; the Respondent knew that there was an artificial credit in this account from the time of the alleged rescission, due to the timing factors involved, which artificial credit failed to trigger the normal sequence of margin calls in a declining market, which would have alerted everyone to the Petitioner's danger; and finally there is the unrefuted testimony of the Petitioner, confirmed by the salesman Leforte, that the Petitioner would never have engaged in any transactions in the Tally stock had he known of the special Two Dollar Rule relating to that stock, which resulted in a loss to the Petitioner of exactly $10,550.00 on the Tally transactions alone.

As far as proximate cause is concerned, it is a cause which in natural and continuance sequence, unbroken by any new and independent cause, produced the Petitioner's damages, and without which the damages would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar result, was probable under the facts as they existed. Williams v. Boulerice, 268 N.C. 62, 149 S.E. 2d 590 (1966); Nance v. Parks, 266 N.C. 206, 146 S.E. 2d 24, 15 A.L.R. 3d 1377 (1966); 6 Strong, N.C. Index 2d Negli-

gence S8. Certainly under the facts as they existed, the failure of the Respondent to furnish the Petitioner this information when it had it, when it was not only foreseeable, but completely foreseeable that what did in fact happen could happen, constituted overwhelming evidence of any necessary causation.

Of course the basis test of causation is foreseeability of injury or damage. Luther v. Asheville Contracting Co., 268 N.C. 636, 151 S.E. 2d 659 (1966); Pinyan v. Settle, 263 N.C. 578, 139 S.E. 2d 863 (1965). In other words, the fact that an injury would not have occurred but for an asserted act of negligence would not make such act a proximate cause of injury, unless consequences of a generally injurious nature were reasonably foreseeable as a result of such act or omission. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E. 2d 641 (1966); 6 Strong N.C. Index 2d Negligence S9. Here the ultimate damage to the Petitioner was completely foreseeable, in view of the facts in this case, even to a layman. With their expertise and the basic raw data at their fingertips, the Respondent, continuously knowing the status of the stock market, certainly knew and could almost conclusively foresee that what might happen to the Petitioner would happen, and happen it did, damaging him in the approximate amount of $63,210.00, of which he only claimed $32,246.77, as attributable to the direct negligence of the Respondent.

The fact that the natural cause of economics was involved here would certainly be no defense to the Respondent since the Respondent's failure to furnish the Petitioner with the information he needed united with the natural cause of economics to produce the damage to the Petitioner. In other words, the Respondent's negligence combined with the natural economic order here to cause the damage, and in such a case a defendant's negligence has been held to be an effective proximate cause notwithstanding the concurrence of such a natural cause. Bennett v. Southern RY Co., 245 N.C. 261, 96 S.E. 2d 31, 62 A.L.R. 2d 758 (1957), cert den. 353 U.S. 958, 1 L. Ed. 2d 907, 77 S. Ct. 865; Nance v. Merchants' Fertilizer & Phosphate Co., 200 N.C. 703, 158 S.E. 486 (1931); 6 Strong, N.C. Index 2d, Negligence Sec. 1. See also the case of McEachern v. Miller, 268 N.C. 591, 151 S.E. 2d 209 (1966), finding negligence where the plaintiff in that case was in a position of peril, and the defendant knew

of such peril, could have assisted him in that peril, and failed to do so.

The major consideration of the Fourth Circuit is apparently that even if the Respondent did withhold information from the Petitioner, that it would in no way be legally responsible for any damages which the Petitioner incurred, since he could have sold himself out at any time. This begs the main question. In order to make any investment decision on whether to sell or hold securities, one obviously has to have full knowledge concerning his securities account. Otherwise, he has no factual basis on which to make any investment decision, no matter what it is. Here, the overwhelming evidence indicates that the Petitioner did not know what he had in his account, what his debit balance was at any time during the period in question, or how low the stocks in the account could go before he would be sold out by the Respondent. These are the bottom line questions which he had, which the Respondent knew the answers to, and which they intentionally withheld from him, thereby causing his damages. It scarcely needs citation to support the proposition that one needs information upon which to base any informed investment decision, and the Petitioner respectfully submits that he could in no way have made any informed decision to sell since he did not know what he had to sell, how much he owed on his debit balance, the forewarnings involved under the margin call requirements, or anything else of significant information to him in connection with this account. Kardon v. National Gypsum Co., 73 Fed. Supp. 788 (E.D. Pa 1947); Baumel v. Rosen, 283 Fed. Supp. 128 (D. Md. 1968), modified 412 F. 2d 571 (4th Cir. 1969), cert. den. 396 U.S. 1037 (1970). Certainly this information would be needed to make any informed investment decision--whether it be to buy, sell or hold. Cases hold that such information is certainly material, since it affects the investor's desires to buy, sell or hold. S.E.C. v. Texas Gulf Sulphur, Co., 401 F. 2d 833 (2nd Cir. 1968), cert. den. 394 U.S. 976, 22 L. Ed. 756, 89 S. Ct. 1454 (1969). Moreover, and most significantly here, the test is objective. Any information is, as a matter of law, material if it might have been considered important by a reasonable investor in making his investment decision. S.E.C. v. Texas Gulf Sulphur, Co., supra; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 24 L. Ed. 593, 90 S. Ct.

616 (1970); 6 Loss, Securities Regulation 3876-3880 (1969 Supp to 2d Ed. of Vol 3).

Here the record amply shows that the Petitioner would have sold had he known that he never would have received the information he sought from the Respondent. That is the bottom line in connection with any claim of lack of causation. Besides such direct evidence, the record is full of enough coulds to amply establish that he would have sold had he known how bad off his account was, and that he never would receive the information he sought from the Respondent. Madison Fund v. The Charter Co. F. Supp. (D.C.N.Y., 1-14-77). Moreover, and most important of all, because of the intentional wrongdoings of the Respondent, the Petitioner was never in a position to have realistically confronted the investment decision of whether to sell or hold in the first place. The Respondent is now in effect asking the court to hold against the Petitioner his overall ignorance of this account, when the Petitioner's ignorance of the account was occasioned by the intentional withholding of the information which the Petitioner sought in the first place. At the Fourth Circuit level, the Respondent very smoothly moved across the abundant evidence in the record relating to the Tally stock, knowing full well that the unrefuted evidence of the Petitioner is that he definitely would not have bought the Tally stock in the first place had he known of the special Two Dollar Rule, and this evidence was confirmed by the salesman for the Respondent. This fact in and of itself establishes an overwhelming prima facie case of at least $10,550.00, just for the Tally stock.

The indication in the Fourth Circuit's opinion that the Petitioner insisted on remaining in these stocks, adopted from the Respondent's brief in the Fourth Circuit, is completely untrue. The record shows that the Petitioner was not even sure what stocks he had, and that he even suggested to the salesman that maybe he should sell some of the stocks. Finally, to completely refute the contention of the Respondent, the uncontroverted evidence in the record shows that he did in fact sell stock in November, and this was confirmed by exhibits of the Respondent as well as the salesman for the Respondent who was in a position to know the status of the account.

The essence of the opinion of the Fourth Circuit is apparently that the Petitioner presented insufficient evi-

dence to support any specific dollar verdict. This contention by the Respondent, readily accepted by the Fourth Circuit, that the Petitioner presented no evidence which would afford a definite basis for the assessment of any specific damages, is not born out by the record.

The Petitioner himself testified that his losses attributable to the negligence of the Respondent in not furnishing him the information which he needed, aggregated some $32,246.77, as determined from the date of October 19, 1973, based upon what he learned after the liquidation of his account must have been in the account on that date. The figures used by the Petitioner are corroborated to the penny by the Respondent's own Exhibits. More specifically, the unrefuted evidence on the Tally stock, showing that he would never have purchased the Tally stock in the first place had he known of the special Two Dollar Rule, resulted in an exact loss in the Tally transactions of $10,550.00. This would establish a very minimum floor of $10,550.00 just for the Tally stock alone.

It should be noted that the Petitioner made out an overwhelming case of specific damages in the aggregate amount of $32,246.77, which includes the $10,550.00 losses in the Tally stock. This is based upon an actual sellout on October 19, 1973, which would be 7 days after the original trade date of October 12, since 7 days settlement is the usual requirement in connection with the brokerage business.

Finally, and most importantly of all, the amount awarded of $19,500.00 was only about two-thirds of the amount the Petitioner was entitled to, based upon the overwhelming evidence in this case. As indicated, that was specifically and accurately calculated from a settlement date of October 19, 1973. Based upon the Respondent's own exhibits, the jury could have selected any subsequent date at which they felt the Petitioner should have sold himself or the date from which his damages should be properly determined, and then using the Respondent's exhibits determine exactly what stocks he had in his account at that date, compute the prices, get the aggregate sales prices, subtract the debit balance which was also shown on the monthly statements, and then arrive at any amount whatsoever, ranging from $32,246.77 down to 0. Any award in that range is more than legally sustainable on the basis of the

entire record, including even the evidence and exhibits of the Respondent. In other words, by the simple matter of using the Respondent's exhibits and a paper and pencil, the jury could have determined any particular date, determined the gross and net sales prices, reduced that amount by the debit balance for the date chosen, taking into account any margin calls which the Petitioner would not have had had he known the status of his account and been able to sell earlier, and come up with an award which is legally sustainable.

The upshot of the contention of the Respondent in this regard is really no more than that the damages cannot be definitely established merely because the jury had to do a small amount of arithmetic, determining the day in which the Petitioner should have sold the stock, and then arithmetically computing the dollar amount of such damages. The Petitioner submits that this contention is without substance, and since the Respondent had more than the benefits of any doubt when the Petitioner's damages were reduced from $32,246.77 to $19,500.00, that barely nominal amount, in view of his overall damages of $63,210.00, as admitted by the Respondent, is more than legally sustainable.

WHEREFORE, the Petitioner respectfully requests this court to grant a Writ of Certiorari to review the opinion of the Court of Appeals for the Fourth Circuit and stay the enforcement of said decision pending the final determination of the same in this proceeding.

Respectfully submitted this the 2nd day of February, 1978.

L. Bruce McDaniel
Attorney for Petitioner
612 Branch Bank & Trust Building
P. O. Box 1182
Raleigh, North Carolina 27602
Telephone: 919/828-4486

CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; and that I have served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States by depositing the same in a post office or an official depository to the attorney for the Respondent addressed as follows:

Mr. Howard W. Manning
MANNING, FULTON & SKINNER
801 Wachovia Bank Building
P.O. Box 1150
Raleigh, North Carolina 27602

L. Bruce McDaniel
Attorney for Petitioner
612 Branch Bank & Trust Building
P.O. Box 1182
Raleigh, North Carolina 27602
Telephone: 919/828-4486

PUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-2137

Edward Lee Bryan, Appellee,

-versus-

Merrill Lynch, Pierce, Fenner & Smith, Inc., Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. J. Braxton Craven, Jr., Circuit Judge.*

Argued: April 8, 1977. Decided: November 9, 1977

Before CLARK Supreme Court Justice,** HAYNSWORTH, Chief Judge, *** and RUSSELL, Circuit Judge.

James E. Davis, Jr. and Howard E. Manning (Manning, Fulton & Skinner on brief) for Appellant; L. Bruce McDaniel (McDaniel and Fogel on brief) for Appellee.

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*
Sitting by designation.

**
Tom C. Clark, Associate Justice of the United States Supreme Court, (Ret.), sitting by designation. Justice Clark died before the opinion was prepared.

***
Because of the death of a member of Judge Haynsworth's family he was unable to be present at oral arguments. It was agreed by counsel that Judge Haynsworth should participate in the decision of this case on the briefs, the record and the tape of oral arguments.

RUSSELL, Circuit Judge:

In December of 1970, the plaintiff-appellee, Edward Lee Bryan, opened a margin account with the defendant-appellant, Merrill Lynch, Pierce, Fenner & Smith, Inc. In a margin account, such as Bryan established with Merrill Lynch, the broker permits the customer to purchase stock or securities by the payment of an agreed percentage of the purchase price, leaving the stock as collateral for the balance due; on this balance, the broker charges interest. An important part of the agreement establishing such an account is the promise of the customer, in the event the stock purchased declines in value, to make additional payments or to furnish other acceptable collateral in order to maintain an agreed margin of protection against loss by the broker. When a decline in value of the stock purchased reaches the point that additional payments or collateral may be required, the broker makes what is known as a "margin," or "maintenance," call on the customer. Should the customer fail to meet such call, the broker may sell the stock in the account for his protection.[1]

Bryan was not an unsophisticated investor. He was a graduate of the United States Naval Academy and was a planner and a manager of Terminal product development with IBM until 1973 and was then employed by Terminal Communications in a similar role. He had purchased and sold stock for a number of years. During this period from December, 1970 to October, 1973, the plaintiff engaged in numerous transactions in his margin account. On October 12, 1973, the plaintiff had in his margin account, among other stocks, 2000 shares of AMIC stock. In response to an inquiry, the Account Executive in the Raleigh office of the defendant, who was handling on defendant's behalf the plaintiff's account, incorrectly informed the plaintiff that the status of his margin account was such that he could

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[1]For definition of margin account, **see Liang v. Dean Witter & Co., Inc.** (D. C. Cir. 1976) 540 F. 2d 1107, 1109, n. 2; **Stephens v. Reynolds Securities, Inc.** (N. D. Ala. 1976) 413 F. Supp. 50, **aff'd.** 532 F. 2d 1053.

[2]The margin requirements for purchases of stock such as that purchased by Bryan are regulated by Regulation T of the Federal Reserve Board. To illustrate: If the Regulation T requirements for the downpayment by the customer are set at 65% of the purchase price, an investor who wishes to purchase additional stock in a margin account must transfer equity into his account in an amount equal to 65% of the purchase price of the stock, and the brokerage house will lend the investor the additional 35%. When the investor does not have 65% of the purchase price in his account when the transaction occurs, he is sent a bill, known as a "Regulation T call," for the amount necessary to equal 65%, and he must make payment within five working days.

engage in a process known as "dollar for dollar substitution," whereby he could substitute 400 shares of Crouse Hinds stock for 600 shares of AMIC stock in his account, which had approximately the same value as the Crouse Hinds stock, without incurring a Regulation T call.[2] Acting on that information, the plaintiff directed the defendant to sell 600 shares of AMIC stock in his account and contemporaneously to purchase in "substitution" 400 shares of Crouse Hinds stock. When the transaction was effected, however, the New York office of the defendant advised the local office that, under Regulation T, there could not be a "dollar for dollar substitution" in connection with the sale and purchase and that additional collateral or payment by the plaintiff would be required under Regulation T. The defendant's local Account Executive, LeFort, testified that on either Thursday evening, October 18, or Friday morning, October 19, he advised the plaintiff of the error and told him that the defendant would have to sell 200 shares of Crouse Hinds stock, thereby generating an amount sufficient to cancel the Regulation T call. LeFort testified he assumed from his conversation with the plaintiff that this was satisfactory to the plaintiff. On Friday, October 19, the defendant notified its New York office that the plaintiff did not want to meet the Regulation T call and to "bust out" 200 shares of Crouse Hinds stock. The plaintiff was informed of the completion of the transaction. The plaintiff, however, was not satisfied, and at his request a meeting with LeFort, defendant's acting Raleigh office manager and operations manager of the defendant was held on October 22. During this meeting the four men reviewed the transactions in the plaintiff's account leading up to the Crouse Hinds transaction, and the plaintiff was given a complete oral status report. Plaintiff specifically requested a written status report on the account, but LeFort said that it would have to come from New York. However, the defendant did agree, at the plaintiff's request, to rescind or "bust" the entire Crouse Hinds transaction so that the 600 shares of AMIC stock involved in the transaction would be returned to the plaintiff's margin account, while the remaining 200 shares of Crouse Hinds stock would be removed from the account.[3] As a result of this final action, the plaintiff was returned to his original position under which he held 2000 shares of AMIC stock and no shares of Crouse Hinds stock.

[3]The defendant agreed to this rescission despite the fact that the market price of AMIC stock had increased and that of Crouse Hinds stock had decreased since the October 12 trade. As a result of this rescission, the defendant absorbed a loss of approximately $1,645.00.

A few days after the October 22 meeting, the defendant's New York office issued its monthly statement of transactions in the plaintiff's margin account through October 26, 1973. This statement, received by the plaintiff in the middle of November, showed that 600 shares of AMIC stock had been sold and that 200 shares of Crouse Hinds stock had been purchased.[4] The plaintiff contacted LeFort about this discrepancy, and LeFort agreed that it was incorrect, due to the "busted trade" taking time to "head up." At that time the plaintiff again asked for a written report on the status of his account; LeFort replied that the back office was busy, but assured him that his account properly reflected at that time the ownership of 2000 shares of AMIC stock. As it turned out, the plaintiff did not actually receive a correct written report of the status of his account until he received his monthly statement for November sometime after December 3, 1973.

The plaintiff had also purchased on margin, at various periods prior to October 19, 1973, 2500 shares of Tally stock. As the market price of both the AMIC and Tally stocks declined in value after that date, plaintiff made additional purchases — 1000 shares of Tally stock and 200 shares of Yates, also on margin, on November 1, and on November 16, 100 shares of AMIC stock, 300 shares of Tally stock and 100 shares of Yates stock on a cash account that plaintiff shared with his wife. The market price of the stocks continued to decline in value, however, and on November 21, the plaintiff sold from his margin account 100 shares of Tally stock, and on November 22, he from his cash account sold the 100 shares of AMIC stock, the 300 shares of Tally stock and the 100 shares of Yates stock. The decline in the stock market value continued unabated, and, on December 3, after the plaintiff indicated his inability to meet a maintenance call, his account was liquidated by the defendant.

A few days later the plaintiff asked LeFort why the last maintenance call had been so high, and LeFort replied that

[4]It was defendant's practice to mail all customers monthly statements of their accounts. When these statements were closed a few days before the end of the month, as was often the case, they did not reflect transactions that may have taken place near the end of the period. In this case, the order for the rescission involving the purchase of 600 shares of AMIC stock and the sale of 200 shares of Crouse Hinds stock was put in by the Raleigh office on October 23. The delay that occurred between the time the order was put in and the time the effected transaction was actually picked up by the defendant's New York computers on October 30 is not developed in the evidence. At any rate, when the plaintiff's monthly statement for October, which showed its closing date as October 26, was mailed to the plaintiff, the rescission was not shown.

it was due to a "two dollar rule"[5] which applied to Tally stock. The plaintiff then said that he wished that he had known of the rule, because if he had he never would have bought the stock in the first place. Although the maintenance call was in fact higher because of the "two dollar rule,"[6] the maintenance requirements on the stock in the plaintiff's margin account were such that the call would have been necessary even without the existence of the rule.

In his complaint, the plaintiff sets forth four counts: one, a federal action based on alleged violations of the Federal Securities Act;[7] another, a State action for fraudulent breach of contract; a third cause of action, sounding in negligence in the management of his margin account; and a fourth count, for punitive damages. He claimed damages attributable to the wilfulness and gross negligence of the defendant in the amount of $32,246.77. This figure was arrived at by selecting a settlement date of October 19, 1973 (seven days after the trade date of October 12, 1973, since seven days is the usual settlement date insofar as broker-dealers are concerned), figuring the excess of the value of the stocks in his margin account over the debit balance as of that date, resulting in a net figure of $23,027.38. To this amount was added $9,219.36 which plaintiff paid in margin calls in November, 1973, giving a claim of a $32,246.77 loss, which was allegedly attributable to the defendant.

[5]The "two dollar rule" provides that an investor must maintain equity in his margin account which is at least as great as the current maintenance requirement, or two dollars a share, whichever is greater. Thus, for example, if the normal maintenance requirement for a certain stock is 50% and the two dollar rule also applies, the maintenance requirement for that stock at a $3.50 market value would be $2.00 rather than $1.75.

[6]According to our calculations, the maintenance call of December 3, 1973 was for $7,035.53. Had the two dollar rule not applied, the call would have been for $3,754.28.

[7]Securities Act of 1933, § 17 (a), 15 U. S. C. § 77g (a); Securities and Exchange Act of 1934, § 10 (b), 15 U.S.C. 78j (b).

[8]After the federal action was dismissed by the district court, the defendant made a motion to dismiss on jurisdictional grounds, contending that, since the basis for federal jurisdiction as stated in the plaintiff's complaint was the Federal Securities Act, the dismissal of that aspect of the case destroyed federal jurisdiction. The district judge overruled the motion without giving any reason. Presumably, he did so because he concluded either that diversity jurisdiction was sufficiently present or that the negligence claim could continue under the court's **pendent** jurisdiction. In any event, there is no appeal from this part of the district judge's rulings and federal diversity jurisdiction, at least, is obvious on the face on the complaint. Of course, as the district judge declared in his charge, the negligence claim was controlled by North Carolina law.

The cause came on for trial before a jury. After the completion of the testimony, the district judge, on defendant's motion, dismissed the counts alleging violations of the Federal Securities Act and breach of contract but heard considerable argument on the right of the defendant to a directed verdict on the negligence claim.[8] This argument was directed primarily to the nature of plaintiff's negligence claim and to the manner in which that issue was to be submitted to the jury, if at all. In the course of such argument, plaintiff's counsel stated his theory of plaintiff's negligence case to be "that Merrill Lynch was negligent in failing to keep him [the plaintiff] sufficiently informed so that he could make an intelligent investment decision." He asked that the case be submitted to the jury on that basis. In elaborating on this theory of the case, plaintiff's counsel contended that, if the jury found that plaintiff did not have sufficient information of the correct status of his account on October 19, 1973, on which to make "an intelligent investment decision," then he was entitled to recover $32,246.77 — the excess of the value of the stock in his account over the debit balance of his account as of October 19, plus the sum of the margin calls met by the plaintiff subsequent to that date. It was conceded at this point by plaintiff's counsel that the plaintiff had testified that, had he been in possession of an accurate written statement of his account on October 19, he was not certain whether he would have sold his stock[9] but urged that that was immaterial because the plaintiff would have been unable to make an "intelligent investment decision" without having in hand a written statement from the defendant showing accurately the stocks in his account. In commenting on this argument, the judge expressed difficulty with plaintiff's theory, particularly as it related to proximate cause and damages. He inquired of counsel for the plaintiff whether, if he accepted plaintiff's theory of his case, he would not have to include in his charge an instruction that, if the jury found that the plaintiff, due to the fault of the defendant, did not have the necessary accurate information in writing on which to make an "intelligent investment decision" to hold

[9]Later, before the case was submitted to the jury, counsel corrected this statement by asserting that the plaintiff had testified that, if he had known "the correct status of his account," he would have "immediately sold out as soon as possible and in any event within a week from the time of the first inception of the busted trade on October 12, 1973." However, we find no such statement in the record, and, in any event, the existence of such a statement on plaintiff's part, in light of the other evidence developed at trial, would not change the outcome of this case on appeal.

or sell the stock that should properly have been shown in his account on October 19, "then you [the jury] can decide that he [the plaintiff] would have been really smart and saved himself thirty-two thousand dollars ($32,000.00) [by selling then], or you may decide that he wouldn't have done anything different — in which case you would return a verdict of zero, or any amount in between." He went on to remark that he was uncertain about submitting the issue to the jury in that form because, as he phrased it, "[h]ow do we let a jury decide what he would have done when he [the plaintiff] doesn't know himself what he would have done?"

Following the argument, however, the judge overruled defendant's motion for a directed verdict and submitted the issue of negligence to the jury. In so doing, he again stated the plaintiff's theory on the basis of which he sought recovery: "* * * he (referring to plaintiff) contends that if he had known on October 19th or 20th or along in there what the facts were — **how much stock he owned, how much he owed** — that he would have sold out this A.M.I.C. and Tally, if he had realized they weren't going to ever give him a complete written statement until December * * * that he would have sold out." Later he instructed the jury that **"the only possible way that Bryan can recover from Merrill Lynch in this lawsuit is for you to be convinced from the evidence and by its greater weight that he, Mr. Bryan, lacked enough information — it doesn't matter whether it's oral or written — that he lacked enough information to intelligently decide what to do, and that if he had that information, he would have sold."** In explaining how the jury should, if it determined that plaintiff should recover, compute damages, the judge stated that the jury should determine when, between October 19 and December 3, the plaintiff would have sold his stock had he known the status of his account. Based on these instructions, to which there were no exceptions, the jury returned a verdict in favor of the plaintiff in the amount of $19,500, a figure which could only be arrived at by an assumption on the part of the jury that the plaintiff would have on some unspecified date subsequent to October 19 sold the stock in his margin account.

The basic attack of the defendant on the judgment below relates to the denial of defendant's motion for a directed verdict because of insufficiency of evidence. In testing the evidence against the motion of the defendant for a directed verdict, we must on appeal do so on the basis of plaintiff's theory of his case, as refined by the district judge in his

charge. In short, we must determine whether there was sufficient evidence to warrant the submission to the jury of the claim of the plaintiff that, as a proximate result of the defendant's allegedly negligent action, he "lacked enough information to intelligently decide what to do, and that if he had that information, he would have sold." If there was, the verdict of the jury should stand; if not, the judgment must be reversed.

The sufficiency of the evidence in a diversity case[10] is tested by federal standards, and those standards were stated by us in **Wratchford v. S. J. Groves & Sons Company** (4th Cir. 1969) 405 F. 2d 1061, 1066. Such standard, as declared in **Wratchford,** is that if there is evidence from which an inference of liability may be deduced or if the evidence is equally susceptible of either of two inferences, one of which will support liability and the other not, the cause is for the jury. But it is an essential part of this rule that such inference or inferences be "within the range of reasonable probability," and if they are not but are "so tenuous that [they] rest[s] merely upon speculation and conjecture," it is "the duty of the court to withdraw the case from the jury." Applying that standard here, the motion of the defendant for a directed verdict should have been granted.

There is not a scintilla of evidence on which the jury in this case could base a finding that the plaintiff, had he had a written statement from the defendant of the exact number of shares of AMIC and Tally stock in his margin account, would have sold either or both of such stocks on October 19 or on any particular date thereafter. The plaintiff, in perfect candor, admitted that he did not know whether he would have sold if he had been in possession of such written information. In returning the verdict it did, the jury, under the instruction by which the district judge, by agreement of the parties, submitted the case, had to find that sometime after October 19 the plaintiff, if he had had a written statement of his account, would have sold his stock and, in addition, had to fix on some date when it was assumed the plaintiff would have sold the stock. This is true, because, as we have already observed, the district judge very pointedly told the jury that "the only possible way" that the plaintiff could recover would be that, if he had been informed the status of his margin account, "he would have sold" and that, if they found he would have sold, they should calculate his damages on the basis of the

[10]See note 8, **supra.**

market value of his AMIC and Tally stock on the date on which they concluded he would have sold. But in finding for the plaintiff under this instruction, the jury was forced to pull out of the air some purely supposititious date identified by no shred of evidence in the record, on which it found the plaintiff would have sold his AMIC and Tally stock. The jury, in returning the verdict it did, had to arrive at an assumed date of sale entirely by "speculation and conjecture," unaided even by conjecture on the part of the plaintiff himself or by any other clue in the record. In fact, such evidence as there was would suggest that the plaintiff never at any time subsequent to October 19 considered selling his stock. There was assuredly nothing which would have prevented him from selling his Tally stock at any time, if he had ever intended to sell it. He knew exactly how many shares he owned. LeFort told him orally his status as to Tally stock; the defendant's written statement of account as of October 26 set forth accurately his ownership of Tally stock. The plaintiff simply did not want to sell either the Tally or the AMIC stock. This is plainly established by his purchases of additional Tally and AMIC stock subsequent to October 19 either in his own or in other accounts under his control.[11] It also cannot be said that he didn't know at all pertinent times that he had at least 1400 shares of AMIC

[11]The plaintiff testified, as we have already noted, that had he known that his purchase of Tally stock was subject to a "two dollar" margin rule, he would not have purchased the stock in the first place. He did not learn of this "two dollar" rule, however, until several days after December 3, after his account was liquidated. Yet, the sole issue submitted, with objection, by the judge to the jury was whether the failure of the defendant to provide the plaintiff with a statement of "how much stock he owned, how much he owed" between October 19 and December 3 had prevented the plaintiff from making a rational determination whether to sell or not during that period. Certainly, something that the plaintiff only learned some days after December 3 could have had no bearing on the specific issue submitted to the jury, on which and on which alone the district judge instructed that defendant's liability in the case was to be resolved. Presumably, this was the reason the district judge did not include within his factual statement of the issue for the jury's consideration anything about the "two dollar" rule. The plaintiff did not except to the district judge's statement of the sole basis of liability on the part of the defendant as submitted to the jury for resolution and any claim in connection therewith is, therefore, not properly before us.

Even assuming, **arguendo**, that the claim were before us, we would be compelled to deny recovery, for there was lacking evidence upon which a jury could reasonably conclude that the defendant's failure to inform the plaintiff of the "two dollar rule" was the proximate cause of the plaintiff's losses in Tally stock. The maintenance requirements on the stock in the plaintiff's margin account were such that the December 3 maintenance call would have been necessary even without the existence of the "two dollar rule." And although the call was higher because of the rule, the plaintiff never alleged or testified that he would have been willing to meet the lower call which would have resulted had the "two dollar rule" not applied. Absent such proof, it cannot be said that the existence of the "two dollar" rule could have caused the plaintiff's loss on Tally stock. **See, Williams v. Boulerice** (1966) 268 N. C. 62, 149 S. E. 2d 590; **Nance v. Parks** (1966) 266 N. C. 206, 146 S. E. 2d 24.

stock. That ownership was stated on the written statement of account furnished him as of October 26 by the defendant. In addition, the Raleigh office was continuously representing to him that actually he had 2000 shares of AMIC stock that he could sell at any time he chose.[12] On November 22, he did sell 1000 shares of AMIC stock, thus evidencing that he was not prevented by anything the defendant did or did not do in liquidating his AMIC holdings. It is true this sale was made by the plaintiff only to satisfy a margin call but that cannot obscure the fact that the plaintiff recognized that he was free and at liberty at any time to sell all or any part of his AMIC holdings and had exercised that freedom. Under the plaintiff's cause of action as submitted to the jury, there was no basis other than the sheerest conjecture on which the jury could have concluded that the plaintiff's failure to liquidate his account resulted proximately from the defendant's allegedly negligent failure to provide him with information concerning the status of his margin account. This being the case, it cannot be said that the defendant's alleged negligence was the proximate cause of the plaintiff's stock losses. Accordingly, the judgment below is reversed with directions for the entry of judgment in favor of the defendant.

[12]LeFort, plaintiff's Account Executive, gave unchallenged testimony to the effect that on several occasions, he reassured the plaintiff as to the correct status of his account. LeFort testified that on October 23, the day the rescission order was put in, "I told him [the plaintiff] that we were going to reinstate his positions," and in early November, he testified, "I told Mr. Bryan that the 'busted trade' was in effect done and as far as we were concerned it was done." Finally, in response to plaintiff's questions regarding the October statement of his account, LeFort testified that "I told him that it [the rescission] had been done." This testimony weakens substantially the plaintiff's claim that he lacked enough information regarding his account to decide intelligently what to do.

Supreme Court, U. S.
FILED
MAR 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

Spring Term 1978

No. 77-1103

EDWARD LEE BRYAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,
Respondent

BRIEF OF RESPONDENT, MERRILL LYNCH, FENNER & SMITH, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Howard E. Manning
Manning, Fulton & Skinner
Attorney for Respondent

801 Wachovia Bank Building
Post Office Box 1150
Raleigh, North Carolina 27602
Telephone: 919/828-8295

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IN THE

Supreme Court of the United States

Spring Term 1978

No. 77-1103

EDWARD LEE BRYAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,
Respondent

BRIEF OF RESPONDENT, MERRILL LYNCH, FENNER & SMITH, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Brief in Opposition to Petition for Writ of Certiorari is submitted pursuant to Rule 24 and Rule 40 of the Rules of the Supreme Court of the United States (U.S.C. Title 28) to disclose to the Court that this cause should not be reviewed for the reasons hereinafter set forth in this Brief.

QUESTIONS PRESENTED

I. WAS THE RENDERING OF THE OPINION BY THE FOURTH CIRCUIT IN THIS CASE SO IRREGULAR AS TO CONSTITUTE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPEAL OF THIS CASE?

II. WAS THE FOURTH CIRCUIT'S DECISION THAT THE TRIAL JUDGE SHOULD HAVE DIRECTED A VERDICT FOR THE RESPONDENT AT THE CLOSE OF THE EVIDENCE ERRONEOUS AND DID SUCH DECISION CONSTITUTE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPEAL OF THIS CASE?

STATEMENT OF THE CASE

This action was instituted by the Petitioner, Edward Lee Bryan, on March 21, 1975, in the United States District Court for the Eastern District of North Carolina. Petitioner Bryan complained that the Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., had failed to use due care in the management of Petitioner's margin account and in supervising Petitioner's account executive's handling of the margin account; had breached its contract with Petitioner; had violated the anti-fraud provisions of Section 10(b) of the Securities Exchange Act; and had violated other regulations and rules governing the management and handling of Petitioner's margin account.

The case was tried before a jury in the United States District Court for the Eastern District of North Carolina, the Honorable J. Braxton Craven, Jr., presiding, on August 9, 10, and 11, 1976. The Court denied Respondent Merrill Lynch's motions for a directed verdict at the close of Petitioner's evidence and at the close of all the evidence, and submitted the case to the jury on the issue of negligence only. A jury verdict in favor of Petitioner was returned in the amount of NINETEEN THOUSAND FIVE HUNDRED ($19,500.00) DOLLARS, and the Court denied Respondent's motions for judgment notwithstanding the verdict and for a new trial.

On August 17, 1976, the Respondent filed notice of appeal to the United States Court of Appeals for the Fourth Circuit. The case was set for oral arguments before the Fourth Circuit on April 8, 1977 before a panel consisting of Clark, Supreme Court Justice, Retired, Haynsworth and Russell. Because of a death of a member of Judge Haynsworth's family he was unable to be present at oral arguments. However it was agreed by counsel that Judge Haynsworth should participate in the decision of this case on the briefs, record and the tape of oral arguments.

Justice Clark died before the opinion was prepared. On November 9, 1977, the opinion of the Fourth Circuit, written by Judge Russell, was rendered. The Fourth Circuit reversed the judgment of the District Court in favor of the Petitioner and directed that judgment be entered in favor of the Respondent, Merrill Lynch. On February 4, 1978, Respondent received Edward Lee Bryan's Petition For Writ of Certiorari to this Court.

A review of the Statement of Facts set forth in the Petition For Writ of Certiorari indicates a voluminous and verbose mixture of argument intertwined with factual allegations of Petitioner and a general indictment of the Fourth Circuit's excellent practice of cutting through the

nonessential facts to reach the heart of the matter in order to render a succinct and well reasoned result.

The Respondent will not waste this Court's time nor demean itself or this Court by engaging in a line by line response to the obviously argumentative Statement of Facts submitted by the Petitioner. The Respondent respectfully refers the Court to the statement of the facts contained in the Opinion of the Fourth Circuit attached as an Appendix to Petition For Writ of Certiorari and incorporates by reference the facts stated in that Opinion as Respondent's Statement of Facts in this Brief.

ARGUMENT

I. THE RENDERING OF THE OPINION BY THE FOURTH CIRCUIT IN THIS CASE WAS PROPER, REGULAR AND DID NOT CONSTITUTE AN IRREGULAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPEAL OF THIS CASE.

Petitioner's initial complaint arises from circumstances beyond the control of anyone, and as stated in the Petition, "may very well not be a legal error in the technical sense" (Petition p. 15). Petitioner claims that the physical absence of Judge Haynsworth from oral arguments on April 8, 1977, and the death of Justice Clark before the publication of the opinion, constitutes such an irregularity and a departure from the accepted and usual course of judicial proceedings as to warrant a reversal of the decision of the Fourth Circuit in this matter.

The record indicates that Judge Russell and Justice Clark heard the oral arguments in the appeal on April 8, 1977. Judge Haynsworth, due to a death in his family, was not present. However, by agreement of counsel for both parties, Judge Haynsworth was to participate in the decision of this case on the briefs, the record and the tape

of oral arguments. The record is devoid of any requests by Petition to the Fourth Circuit for a rehearing of the case *en banc* or otherwise. It should also be noted that there were no dissents from the opinion written by Judge Russell.

Petitioner now seeks a Writ of Certiorari claiming that the physical absence of Judge Haynsworth, to whose absence Petitioner's counsel agreed, and the death of Justice Clark constitute some evidence of irregularity surrounding the decision of the Fourth Circuit. This claim is without merit. Contrary to the claims of Petitioner in this regard, the opinion of Judge Russell indicates that justice was in fact done in this case and that all standards of fairness and judicial propriety were met in the Fourth Circuit. No further comment on this claim is deemed necessary.

II. THE FOURTH CIRCUIT'S DECISION THAT THE TRIAL JUDGE SHOULD HAVE DIRECTED A VERDICT FOR THE RESPONDENT AT THE CLOSE OF THE EVIDENCE WAS CORRECT AND DID NOT CONSTITUTE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The sole remaining question is whether or not there was sufficient evidence presented to permit this case to go to the jury in the first place. Petitioner is now complaining because the Fourth Circuit, in reviewing the evidence presented at trial, reached the sound conclusion that there was insufficient evidence presented to warrant submission of the case to the jury and that Respondent's motion for a directed verdict should be allowed.

Petitioner's theory of the case, as discussed in the Fourth Circuit's opinion, required proof that because of Merrill Lynch's purported negligence in failing to furnish Petitioner with an accurate statement concerning his margin

account, Petitioner lacked enough information to intelligently decide what to do with respect to his AMIC and Tally stocks and that if Petitioner had been furnished that information he would have sold out AMIC and Tally before he incurred the losses which he seeks to recover from Merrill Lynch.

It is against this theory that the evidence presented must be measured to determine the correctness or incorrectness of the Fourth Circuit's determination. It is well established that for purposes of determining a motion for a directed verdict, the evidence of the party opposing the motion should be considered in the light most favorable to that party and that the Court should allow the non-moving party the benefit of every reasonable inference arising from the evidence. However, with respect to allowable inferences, the foregoing rule requires that such inferences as may arise from the evidence be of reasonable probability and not based upon speculation or conjecture. *Wratchford v. S. J. Groves and Sons Company*, 405 F. 2d 1061 (4th Cir. 1969); *Minton v. Southern Ry. Co.*, 368 F. 2d 719 (6th Cir. 1966).

In this case, the Petitioner failed to present any evidence at trial to prove that his stock market losses in AMIC and Tally stocks were caused by the actions of Merrill Lynch. Proof of a causal connection between a defendant's allegedly negligent acts and the financial losses suffered by a plaintiff is an essential element of a negligence claim. *Reason v. Sewing Machine Co.*, 259 N.C. 264, 130 S.E. 2d 397 (1965); *Weatherman v. White*, 10 N.C. App. 480, 179 S.E. 2d 134 (1971). The Petitioner was required to prove that his injuries were caused by the negligence of Merrill Lynch and such proof of causation must exceed mere speculation or conjecture or the Respondent would be entitled to the directed verdict. *Johnson v. Williams*, 19 N.C. App. 185, 198 S.E. 2d 192 (1973); *Lane v. Dorney*, 250 N.C. 215, 108 S.E. 2d 55 (1959).

Instead of presenting evidence proving that Petitioner's stock market losses were caused by Respondent, the Petitioner's evidence, including his own testimony, shows that his stock losses in AMIC and Tally were solely the result of Petitioner's insistence in holding AMIC and Tally in the face of a declining market. The Respondent cannot be held liable unless the Petitioner had proved that the conduct of Merrill Lynch prevented the Petitioner from selling. The following clearly indicates that Respondent was not the cause of Petitioner's market losses.

It is abundantly clear that Petitioner could have avoided the loss in AMIC and Tally stocks only by selling before their market value declined. Petitioner claims that he did not sell because Merrill Lynch's allegedly negligent failure to provide him with information concerning his margin account caused him to remain uninformed to the extent that he could not make an intelligent decision to sell or hold, but that had he had the information, he would have sold and thereby avoided a loss.

At the trial, Petitioner admitted that he could have sold the AMIC and Tally stocks in his margin account at any time and that Respondent did not prevent him from selling the stocks. In response to questioning on cross examination about Petitioner's AMIC stock in his margin account during the period from October 12, 1973 to October 26, 1973, when the stock increased in value, Petitioner responded:

"A. I didn't sell.

Q. There was no reason why you couldn't have sold if you wanted to, was there?

A. I could have sold it."

Petitioner also stated during his cross examination:

"Mr. Manning, I never refute your argument that at any time since I ever did business with Merrill Lynch, I was never constrained from selling . . ."

Petitioner also stated during his cross examination:

"Q. Your losses occurred because of the drop in the market, didn't they?

A. My losses occurred, sir, by my selling the stock at less than I paid for it.

Q. All right, now, there was at no time in all of your dealings with Merrill Lynch any effort on Merrill Lynch to keep you from selling your stock at any time you wanted to sell it.

A. No. . . ."

The foregoing supports that portion of the Fourth Circuit's opinion on page 14 which states:

"There is not a scintilla of evidence on which the jury in this case could base a finding that the plaintiff, had he had a written statement from the defendant of the exact number of shares of AMIC and Tally stock in his margin account, would have sold either or both of such stocks on October 19, or on any particular date thereafter. The plaintiff, in perfect candor, admitted that he did not know whether he would have sold if he had been in possession of such written information."

Additionally, Petitioner's own testimony at trial indicates that he believed that the market value of AMIC and Tally stocks would increase and that he was contemplating buying additional shares in both stocks. Such conduct is at cross purposes with the theory of Petitioner's case.

Although the market value of AMIC rose to TWENTY-TWO ($22.00) DOLLARS per share on October 26, 1973, and did not drop below the October 12, 1973 level of EIGHTEEN ($18.00) DOLLARS and seven-eighth (⅞) per share until November 5, 1973, Petitioner chose not to liquidate his account at the higher price. He testified to his belief in the investment potential of the stocks in the following words:

"Well, the stocks were going down in November, and I still believe this idea that, you know, eventually the stocks would go up. . . ."

Pursuant to such belief, on November 15, 1973, Petitioner purchased One hundred (100) additional shares of AMIC and three hundred (300) additional shares of Tally in a joint cash account with his wife. Petitioner described the reason for his purchase by again indicating his view that the price of the stocks would increase, stating:

"And the idea here is that, anticipating that the stocks would go back up, and clearly putting it in my joint account with my wife, so that we wouldn't be vulnerable to this confusion in the margin account."

The first indication of any disenchantment with the stocks occurred on November 21. Bryan described his feelings at this time in the following words:

"It was apparent that on the 21st of November, really before the funds were due, even for the things I had bought the previous week, that the stocks were going down, and I told Mr. Lefort, go ahead and sell that — you know — and transfer the residual funds into the margin account."

On November 21, 1973, Bryan sold the 100 shares of AMIC in his cash account at 11⅝, 900 shares and 100

shares in the margin account at 11¾ and 11⅞ respectively. Despite the continuing decline in the price of AMIC, the plaintiff failed to sell additional shares, and his remaining 1,000 shares were liquidated on December 3, 1973.

The plain fact of the matter is that the Petitioner did not want to sell his AMIC or Tally stock at all, that Petitioner believed that the market would go up, and that nothing Merrill Lynch did or did not do had any effect upon Petitioner's actions with regard to the stock in his margin account. Petitioner knew he could sell his entire account and that Merrill Lynch imposed no restraints upon his doing so.

From the evidence presented, there was no basis, other than guesswork and conjecture on the part of the jury, upon which to conclude that Petitioner's failure to sell his AMIC and Tally stocks resulted in any manner from Merrill Lynch's alleged negligent failure to provide the Petitioner with information concerning his margin account. There being no evidence that any act on the part of Merrill Lynch caused the loss to the Petitioner, the motion for directed verdict was correctly decided by the Fourth Circuit and the Petition For Writ of Certiorari should not be granted.

CONCLUSION

The Petition for certiorari is without merit and should be denied.

Respectfully submitted this the 2nd day of March, 1978.

Howard E. Manning
MANNING, FULTON & SKINNER

Attorneys for Merrill Lynch, Pierce, Fenner & Smith, Inc.
801 Wachovia Bank Building
Post Office Box 1150
Raleigh, North Carolina 27602
Telephone: 919/828-8295

CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; and that I have served a copy of the foregoing brief in opposition to Petition for Writ of Certiorari to the Supreme Court of the United States by depositing the same in a post office or an official depository to the attorney for the Respondent addressed as follows:

L. Bruce McDaniel, Esquire
Attorney for Petitioner
612 Branch Bank & Trust Building
Post Office Box 1182
Raleigh, North Carolina 27602

This the 3 day of MARCH, 1978.

Howard E. Manning
MANNING, FULTON & SKINNER
Attorneys for Respondent

801 Wachovia Bank Building
Post Office Box 1150
Raleigh, North Carolina 27602
Telephone: 919/828-8295